

(2) Overmarketings in a prior year, the reduction in the farm acreage allotment or farm marketing quota for the violation shall be made before making the reduction for overmarketings.

(m) *Correction of farm records.* For burley and flue-cured tobacco, where farm data for actual marketings are determined to be incorrect because of a violation, the records shall be corrected for each farm on which the tobacco was produced, and for each farm whose card was used to identify marketings.

(n) *Report on Form MQ-92, Estimate of Production.* An estimate of production, Form MQ-92, shall be prepared immediately prior to harvest for each farm for which the county or State ASC committee or a representative of the county or State ASC committee believes than an MQ-92 for the farm would be in the best interests of the program. The county ASC committee shall have the authority to visit any farm for the purposes of making an estimate of production or determination of planted acreage needed to complete an estimate of production.

(o) *Effect of false identification on establishing future farm marketing quotas.* Notwithstanding any other provision of this section, with respect to burley or flue-cured tobacco, if a producer falsely identifies such tobacco as having been produced on or marketed from a farm, the quantity of the tobacco which is falsely identified shall be considered, for the purpose of establishing future farm marketing quotas, as having been produced on both the farm for which it was identified as having been produced, and the farm of actual production, if known, or, as the case may be, such quantity of tobacco shall be considered as actually marketed from the farm.

[55 FR 39914, Oct. 1, 1990, as amended at 57 FR 43582, Sept. 21, 1992]

§ 723.409 Producer penalties; false identification and related issues.

(a) *Penalties for marketing over 103 percent of farm quota—burley and flue-cured tobacco.* For burley and flue-cured tobacco, a penalty at the full rate shall be due on any marketings which exceeds 103 percent of the effective farm marketing quota.

(b) *Penalties for false identification or failure to account—*(1) *For burley tobacco.* If any producer falsely identifies or fails to account for the disposition of any tobacco produced on a farm, penalty at the full rate shall be due on the larger of the:

(i) Actual marketings above 103 percent of the effective farm marketing quota, or

(ii) Amount of tobacco equal to 25 percent of the effective farm marketing quota. The requirement of paragraph (b)(ii) of this section shall not be applied if the county ASC committee determines with concurrence of State ASC committee, that assessment of penalty based on 25 percent of the effective farm marketing quota would be unduly harsh when compared with the pounds in violation and no adverse effect on the program would result.

(2) *For flue-cured tobacco.* If any producer falsely identifies or fails to account for the disposition of any tobacco produced on the farm, a penalty at the full rate shall be assessed on the larger of:

(i) The actual marketings above 103 percent of the effective farm marketing quota; or

(ii) The sum of pounds equal to 25 percent of the effective farm marketing quota plus the pounds determined by multiplying the farm yield times the acres harvested in excess of the effective farm acreage allotment. If such amount exceeds the amount determined in accordance with paragraph (b)(2)(i) of this section the penalty assessed may be based on the amount determined in accordance with such paragraph if the county ASC committee determines, with the concurrence with the State ASC committee, that the penalty assessed on the amount determined in accordance with this paragraph would be unduly harsh in relation to the quantity of tobacco which is falsely identified or which is not accounted for and the tobacco program would not be adversely effected.

(3) *For kinds of tobacco other than burley or flue-cured tobacco.* (i) If any producer falsely identifies or fails to account for the disposition of any kind of tobacco produced on a farm, an amount of tobacco equal to the normal yield of the number of acres harvested in the

current year in excess of the farm acreage allotment for the kind of tobacco shall be deemed to have been marketed from such farm.

(ii) If any producer who manufactures tobacco products from tobacco produced by or for such person fails to make the reports or makes a false report, the producer shall be deemed to have failed to account for the disposition of tobacco produced on the farm(s) involved. The filing of a report by a producer under § 723.408 of this part which the State ASC committee finds to be incomplete or incorrect, shall constitute a failure to account for the disposition of tobacco produced on the farm.

(4) In addition to any other circumstances in which a penalty may be assessed under this part, the marketing or pledging for a price support loan of any tobacco by using the producer's marketing card, when the producer is not considered to have been an "eligible producer" under the provision of part 1464 of this title, shall be considered to be a false identification of tobacco. This remedy shall be in addition to all other as may apply.

(c) *Canceled allotment or quota.* If part or all of the tobacco produced on a farm has been marketed and the farm acreage allotment or farm marketing quota for the farm is canceled, any penalty due on the marketings shall be paid by the producers.

(d) *Overmarketing proportionate share of effective farm marketing quota-burley or flue-cured tobacco.* With respect to burley or flue cured tobacco, if the county ASC committee determines that the farm operator or another producer on the farm has marketed more than 103 percent of such operator's or producer's share of the effective farm marketing quota with intent to deprive some other producer on the farm from marketing such producer's proportionate share of the same crop of tobacco, such operator or other producer shall be liable for marketing penalties at the full rate per pound for each pound of tobacco marketed above 103 percent of such producer's share of the effective farm marketing quota. However, the sum of such penalties shall not exceed the total penalties due on total marketings above 103 percent of

the effective farm marketing quota for the farm on which such tobacco was produced. Before assessment of penalty pursuant to this paragraph, a hearing shall be scheduled by the county ASC committee and the operator and affected producers shall be invited to be present, or to be represented, to determine whether the operator or another producer on the farm has marketed more than 103 percent of such person's proportionate share of the effective farm marketing quota. The notice of the hearing shall request the farm operator and affected producers to bring to the hearing floor sheets and other relevant supporting documents. At least two members of the county ASC committee shall be present at the hearing. The hearing shall be held at the time and place named in the notice and any action taken to impose penalty shall be taken after the hearing. If the farm operator or other affected producer does not attend the hearing, or is not represented, the county ASC committee shall make a determination on the basis of available records and shall assess any penalties that may be required against the applicable person.

(e) *Penalties not to be assessed-burley or flue-cured tobacco.* With respect to burley or flue-cured tobacco, if the operator or another producer on the farm markets a quantity of tobacco above 103 percent of the effective farm marketing quota for the farm and such overage is found to have been caused by the failure to record or improper recording of tobacco poundage data on the marketing card, that amount of the penalty as was due to such failure to record or improper recording will not be required to be paid by the farm operator or other producer if:

(1) For amounts of \$10 or less, the county ASC committee, and

(2) For amounts over \$10, the county ASC committee, with the approval of the State ASC committee, determines that each of the following conditions is applicable:

(i) The failure to record or incorrect recording resulted from action or inaction of a marketing recorder or another FSA employee, and

(ii) The farm operator or another producer on the farm had no knowledge of such failure or error. Overmarketings

for a farm for which the marketing penalty will not be paid pursuant to the provisions of this paragraph shall be determined based upon the correct effective farm marketing quota and correct actual marketings of tobacco from the farm.

(f) *Ineligible for price support.* A penalty at the full rate announced for a kind of tobacco for the current marketing year shall be assessed on any marketing of any kind of tobacco by any producer on a farm if such producer is ineligible for price support because the farm operator or other producer on the farm has not agreed to make a contribution to the No Net Cost Fund or pay an assessment to the No Net Cost Account, as applicable, in accordance with part 1464 of this title.

(g) *Person to pay penalty when erroneous rate is shown on card (except burley and flue-cured tobacco).* If an erroneous penalty rate is shown on a marketing card and tobacco is identified by such card, the producer shall remit any additional penalty due for the sale.

[55 FR 39914, Oct. 1, 1990, as amended at 57 FR 43583, Sept. 21, 1992]

§ 723.410 Penalties considered to be due from warehouse operators, dealers, buyers, and others excluding the producer.

Any marketing of tobacco under one of the following conditions shall be considered to be a marketing of excess tobacco.

(a) *Auction sale without burley or flue-cured tobacco marketing card.* For burley and flue-cured tobacco, any first marketing of tobacco at an auction sale by a producer which is not identified by a valid marketing card at the time of marketing shall be considered to be a marketing of excess tobacco and the penalty thereon shall be collected and remitted by the warehouse operator unless prior to marketing, an AMS inspection certificate is obtained showing that the tobacco is of a kind not subject to marketing quotas.

(b) *Auction sale without dark air-cured, fire-cured, or Virginia sun-cured tobacco marketing card.* For dark air-cured, fire-cured, or Virginia sun-cured tobacco, any first marketing of tobacco at an auction sale by a producer which is not identified by a valid marketing card

(MQ-76 or MQ-77 (including sale memo)) on or before the last warehouse sale day of the marketing season, or within 4 weeks following the date of marketing, whichever comes first, shall be identified by an MQ-82, and shall be presumed, subject to rebuttal, to be a marketing of excess tobacco. The penalty thereon shall be paid by the warehouse operator.

(c) *Burley or flue-cured tobacco non-auction sale.* For burley and flue-cured tobacco, any nonauction marketing of tobacco which:

(1) Is not identified by a valid marketing card and recorded at the time of marketing on MQ-79, Dealer's Report, the marketing card, and MQ-72-2, Report of Tobacco Nonauction Purchase; or,

(2) If purchased prior to the opening of the local auction market for the current year, it is not identified by a valid marketing card and recorded on MQ-79, the marketing card, and MQ-72-2, Report of Tobacco Nonauction Purchase not later than the end of the calendar week which includes the first sale day of the local auction markets, shall be considered a marketing of excess tobacco. The penalty thereon shall be collected by the purchaser of such tobacco, and remitted with MQ-79, unless prior to marketing an AMS inspection certificate is obtained showing that the tobacco is of a kind not subject to marketing quotas.

(d) *Nonauction sale, except burley, flue-cured, and cigar tobacco.* For dark air-cured, fire-cured, or Virginia sun-cured tobacco, any nonauction sale of tobacco which:

(1) Is not identified by an MQ-76 or MQ-77 (including a valid sale memo); and

(2) Recorded on MQ-79, Dealer's Record, not later than the end of the calendar week in which the tobacco was purchased; or

(3) If purchased prior to the opening of the local auction market for the current year, is not identified by an MQ-76 or MQ-77 (including a valid sale memo) and recorded on MQ-79 not later than the end of the calendar week which includes the first day of the local auction markets, shall be presumed, subject to rebuttal, to be a